82-445

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

HAIM MIZRAHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARVEY A. SCHNEIDER

Suite 400
924 Westwood Boulevard
Los Angeles, CA 90024
(213) 824-0069

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Was Mizrahi denied the effective assistance of counsel at trial when his counsel failed to object to the introduction into evidence of the most critical item of evidence offered by the government, namely, a "rap sheet" from the State of Israel, under circumstances where the government could not have obtained a conviction had the proper objections been interposed?

2. Was Mizrahi denied the effective assistance of counsel at trial in that his counsel failed to challenge, or in any way object to, the fact that Mizrahi was indicted under and convicted of violating a statute (18 U.S.C. §1425(a)) which did not, as a matter of law,

proscribe the conduct in which it was alleged Mizrahi had engaged?

PARTIES TO THIS PROCEEDING

The names of all parties to the proceeding in the Circuit Court whose judgment is sought to be reviewed are contained in the caption of this case.

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THE COURT OF APPEALS' DECISION

The opinion rendered by the Court of Appeals in this case was not published. A copy of the court's opinion is attached hereto as Appendix "A".

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was filed on July 23, 1982.

No petition for rehearing was filed in the Court of Appeals. On August 19, 1982, upon motion of Mizrahi, the Court of Appeals stayed issuance of its mandate "pending the timely filing of a petition for certiorari with the United States Supreme Court and thereafter until the Supreme Court acts upon the petition."

28 U.S.C. §1254(1) confers in this Court jurisdiction to review the Court of Appeals judgment by a writ of certiorari.

RULES AND STATUTES INVOLVED IN THIS CASE

This case involves the following rules and statutes:

1. Rule 803(8) Fed. Rules Evidence.
2. 18 U.S.C. §1001.
3. 18 U.S.C. §1015.
4. 18 U.S.C. §1425(a).
5. 8 U.S.C. §1451(a) and (g).
6. 1940 Nationality Act, §338 (a)-(e).
7. 1940 Nationality Act, §346 (a).
8. 1906 Nationality Act, §15.
9. 1906 Nationality Act, §23.

The pertinent text of each rule and statute referred to above is set forth in Appendix "B" hereto.

STATEMENT OF THE CASE

On May 5, 1981, the grand jury returned an indictment charging Mizrahi with violating 18 U.S.C. §1425(a) (unlawfully procuring naturalization). The indictment alleged that Mizrahi knowingly procured naturalization contrary to law in that he stated that he had never been convicted either in or outside of the United States of any offense other than traffic violations, whereas in fact he had been convicted of various crimes in Israel.

On July 21, 1981, a trial by jury commenced. The trial continued until July 24, 1981, on which date the jury returned a verdict of guilty.

On September 21, 1981, the court committed Mizrahi to the custody of the Attorney General or his authorized

representative for a period of one year and one day and fined him $5,000.00. Execution of the term of imprisonment only was suspended, and Mizrahi was placed on probation for a period of three years. The court further ordered, as a condition of probation, that Mizrahi reside in a community treatment center for a period of six months. The court also ordered that Mizrahi's Certificate of Naturalization be cancelled pursuant to the provisions of 8 U.S.C. §1451(g).

Based on the allegations contained in the indictment, in order for the government to have obtained a conviction in this case, it was required to prove Mizrahi in fact sustained convictions in Israel. The record in this case reveals

that in its case-in-chief, the government sought to prove, and in fact proved, Mizrahi sustained convictions in Israel by introducing into evidence, in the absence of a defense objection, a document which can best be described as a "rap sheet" from the State of Israel (Government's Exhibit "1"), i.e., a document which listed convictions purportedly sustained by Mizrahi in Israel. It is defense counsel's failure to object to the introduction into evidence of this document on <u>any</u> ground which forms the basis of one aspect of Mizrahi's claim that he was denied the effective assistance of counsel.

As indicated above, Mizrahi was indicted under and convicted of violating 18 U.S.C. §1425(a). The gravamen of the indictment was that Mizrahi, in

obtaining naturalization, falsely represented that he had never been convicted of any offense in or outside of the United States. The legislative history of §1425(a) and its predecessor statutes reveals that it was never intended by Congress that a person could be prosecuted under §1425(a) for making a false statement in a naturalization proceeding which was not related to the statutory requirements for naturalization. Yet, this was precisely what occurred in the present case, without Mizrahi's trial counsel ever registering an objection to or challenging the prosecution under §1425(a). Counsel's failure to object to Mizrahi's being prosecuted under the wrong statute represents a second aspect of his ineffective assistance of counsel claim.

JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had jurisdiction of this case under 18 U.S.C. §3231, and the Court of Appeals had jurisdiction under 28 U.S.C. §1291.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The writ in this case should be allowed because the Court of Appeals has incorrectly decided important questions of federal law which have not been, but should be, settled by this Court. Moreover, unless this Court reverses the decision of the Court of Appeals, Mizrahi will be deprived of his citizenship even though the Court of Appeals decision is patently erroneous. The following arguments are submitted in order to

amplify the reasons relied on for the allowance of the writ.

Mizrahi Was Denied the Effective Assistance of Counsel at Trial in That his Counsel Failed to Object to the Introduction into Evidence of the Israeli "Rap Sheet", Without Which the Government Could Not Have Obtained a Conviction.

As indicated above, in order to obtain a conviction in this case, based upon the allegations contained in the indictment, it was absolutely necessary that the government prove Mizrahi sustained convictions in Israel. The government sought to prove such convictions by introducing into evidence a "rap sheet" from the State of Israel, which purportedly listed convictions sustained by Mizrahi in Israel. This "rap sheet" was admitted into evidence because

Mizrahi's trial counsel made absolutely no objection to its introduction. It is submitted Mizrahi's trial counsel failed to render the assistance of counsel that was "within the range of competence demanded of attorneys in criminal cases" (**McMann v. Richardson**, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)) when he failed to object to the introduction into evidence of the single most important item of evidence presented by the government. Indeed, had counsel made the appropriate objections, Mizrahi would have been entitled to a judgment of acquittal at the conclusion of the government's case-in-chief. Counsel's ineffective assistance is particularly egregious in this case

since Mizrah's conviction led to the revocation of his citizenship.

The Israeli "Rap Sheet" Was Hearsay and No Exception to the Hearsay Rule Was Applicable.

There can be little doubt that the Israeli "rap sheet" was hearsay. Thus, the "rap sheet" was a document signed by someone named "Herstig" which was offered to prove the truth of the matter contained in the document, namely, that Mizrahi had sustained a number of convictions in Israel (Rule 801, Fed. Rules Ev.). It follows, therefore, that such document was inadmissible unless it could be brought within a recognized exception to the hearsay rule.

In the Court of Appeals the government argued only that the Israeli "rap sheet" would have been admissible, over

defense objection, pursuant to the provisions of Rule 803(8), Fed. Rules Ev. (the Public Records Exception). Contrary to the government's argument, it is clear the Israeli "rap sheet" would not have been admissible under Rule 803(8).

Rule 803(8), Fed. Rules Ev., creates a hearsay exception for public records and reports. (This rule is reproduced in Appendix "B" to this petition.) It is clear the Israeli "rap sheet," which merely lists convictions purportedly sustained by Mizrahi, does not qualify as a public record under Rule 803(8).

First, the "rap sheet" does not set forth the activities of any office or agency, and accordingly, it was not admissible under subparagraph (A) of §803(8). Similarly, it is nowhere

indicated on the "rap sheet," or anywhere else in the record, that the "rap sheet" "contains matters observed pursuant to duties imposed by law as to which matters there was a duty to report" (subparagraph (B). Moreover, it is submitted subparagraph (B) would not form a basis for admitting the "rap sheet" into evidence since that subparagraph expressly excludes from its operation documents containing "in criminal cases matters observed by police officers and other law enforcement personnel." Whatever else may be said of the Israeli "rap sheet," it is clear it emanated in some fashion from the Israel Police Department. 1/

1/ It is also submitted subparagraph (C) of §803(8) is inapplicable on its face since it applies only "in civil actions and proceedings and against the (continued)

The government was able to cite no reported case, and counsel for Mizrahi has been unable to discover one, in which a document such as a "rap sheet" was admitted into evidence in a criminal case, over a defense objection, to prove the defendant had sustained a conviction. Indeed, the cases indicated the "rap sheet" was inadmissible. See, e.g., **Prevost v. United States**, 149 F.2d 747 (9th Cir. 1945) (certified arrest card of defendant held to be hearsay and admission into evidence prejudicial); **Clainos v. United States**, 163 F.2d 593 (D.C. Cir. 1947) (picture of witness which was contained in police department files and which contained a series of notations on reverse side indicating the

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government in criminal cases." (Emphasis added.)

witness had been convicted of numerous crimes held to have been improperly admitted into evidence, the court stating:

> "Accusations of convictions for crime are serious, and a witness's denial should not be contradicted by anything less than a record authenticated by an official directly connected with the courts, within the 'business' of which the convictions occurred . . . ." (163 F.2d at p. 596));

United States v. Cox, 536 F.2d 65 (5th Cir. 1976) (trial court committed prejudicial and reversible error when it admitted into evidence the defendant's F.B.I. "rap sheet," the court stating:

> "In order properly to evidence appellant's admitted conviction for prostitution, the government should have obtained a certified copy of the judgment of conviction . . . ." (536 Fed.2d at p. 70 fn 11));

and **United States v. Scott**, 592 F.2d 1139, 1143 (10th Cir. 1979) (holding

that a "'rap sheet' is not admissible as public record of the conviction.")

It is absolutely clear that the Israeli "rap sheet" which was used by the government in this case to obtain Mizrahi's conviction would not have been admissible under Rule 803(8) had defense counsel interposed the appropriate hearsay objection. Indeed, as is indicated in the authorities cited above, the government was required to prove Mizrahi had sustained convictions in Israel by introducing court records of his conviction, not by a "rap sheet" emanating from the Israel Police Department. In fact, in **Lloyd v. American Export Lines, Inc.**, 580 F.2d 1179, 1190 (3rd Cir. 1978), the court specifically concluded that "admissibility of a party's conviction is governed by Rule 803(22) of the

Federal Rules of Evidence," [2] and "that only the judgment of conviction itself is admissible under Rule 803(22) . . . ." In light of the foregoing, had Mizrahi's trial counsel objected to the introduction into evidence of the Israeli "rap sheet" on the ground it was hearsay, the trial court would have been required to sustain the objection. Moreover, once the government was denied the use of the "rap sheet" to prove

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[2] Rule 803(22) of the Federal Rules of Evidence provides as follows: "Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused [are not excludable by the hearsay rule] . . . ."

Mizrahi's alleged convictions, the latter would have been entitled to a judgment of acquittal as a matter of law. It cannot be doubted, therefore, that trial counsel's failure to object to the introduction into evidence of the "rap sheet" severely prejudiced Mizrahi and, in fact, deprived Mizrahi of his Sixth Amendment right to confront the witnesses against him (i.e., the source of the information contained in the "rap sheet").

The somewhat astonishing feature of this case is that the Court of Appeals recognized that the ineffective assistance of counsel issues presented by Mizrahi in this case were significant ones. Thus, in its one-page Memorandum Opinion the court stated:

> "We need not reach the difficult substantive issues raised in

> support of Mizrahi's contention of ineffective assistance of counsel because, considering the developing nature of this area of the law, we do not feel that Mizrahi's counsel failed to exercise the skill, judgment and diligence of a reasonably competent attorney. (Citations omitted) . . . ."

With all due respect to the Court of Appeals, it is difficult to understand how it could conclude that Mizrahi's trial counsel was excused from making a rather elementary hearsay objection because of the "developing nature of this area of the law." Indeed, it would be surprising to present counsel for Mizrahi that any reasonably bright law school graduate would not recognize that an attempt by the government to introduce into evidence, as proof of a defendant's conviction, a "rap sheet" which emanated from a foreign police department presented substantial hearsay problems.

In sum, it is respectfully submitted that the Court of Appeals clearly erred when it concluded Mizrahi's trial counsel did not render ineffective assistance of counsel by failing to object on the ground of hearsay to the introduction into evidence of the Israeli "rap sheet." 3/

It is also submitted counsel rendered ineffective assistance when he failed to

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3/ There can be no doubt that defense counsel's failure to object to the introduction into evidence of the Israeli "rap sheet" on hearsay grounds did not constitute a tactical or strategic decision. Thus, in his declaration dated September 3, 1981, which was submitted in connection with Mizrahi's Motion for Continuance of Sentencing Hearing filed on September 4, 1981, Mizrahi's trial counsel (Theodore Flier) stated: ". . .I had no tactical or strategic motive in failing to object to the introduction into evidence of the police 'rap sheet' purporting to show that my client had been convicted of an offense in Israel."

object to the introduction into evidence of the "rap sheet" on the ground it was not properly authenticated under Rule 902(3) of the Federal Rules of Evidence. Specifically, the Israeli "rap sheet" does not purport to be signed by a person with authority and having an official capacity, as is required by Rule 902(3). Moreover, it does not appear that the Israeli "rap sheet" was certified in conformity with Rule 902(3). Specifically, the Israeli "rap sheet" does not appear to bear the seal of the Israel Police and its certification, by one "R. Sivan," fails to ascribe any official position or authority to the person whose signature appears on the Israeli "rap sheet" (Mr. Herstig), as is specifically required by Rule 902(3). Additionally, it should be noted that

the consular certification contains a disclaimer that "for the content of the annexed document the Embassy assumes no responsibility." For all of the reasons stated above, it is respectfully submitted that had counsel for Mizrahi objected to the introduction into evidence of the "rap sheet" on the ground it was not properly authenticated, that objection would have been granted and the government would have been denied the use of the "rap sheet" as part of its case-in-chief. By failing to object to the introduction into evidence of the "rap sheet" on the ground it was not properly authenticated, counsel for Mizrahi clearly failed to render assistance "within the range of competence demanded of attorneys in criminal cases." **McMann v. Richardson, supra.**

Mizrahi Was Denied the Effective Assistance of Counsel at Trial in that his Counsel Failed to Challenge, or in Any Way Object to, the Fact that Mizrahi Was Indicted Under and Convicted of Violating a Statute (18 U.S.C. §1425(a)) Which Did Not, as a Matter of Law, Proscribe the Conduct in Which It Was Alleged Mizrahi had Engaged.

18 U.S.C. §1425(a), the statute pursuant to which Mizrahi was indicted, provides as follows:

> "Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship. . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The provisions of both §1425(a) and Title 18 U.S.C. §1015(a) were originally contained in the Nationality Act of 1940 (54 Stat. 1163). (See Reviser's Notes to §§1425(a) and 1015(a).) Section 346 of the 1940 Act contained the penal provisions and provided, in part, as follows:

> "Sec. 346.(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not - (1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.
>
> "(2) Knowingly to procure or attempt to procure --
>
> "(a) The naturalization of any such person, contrary to the provisions of any law; or
> "(b) Documentary or other evidence of naturalization or of citizenship of any such

person, contrary to the provisions of any law. . . ."

As the Reviser's Notes indicate, subsection (a)(1) of §346 later became subparagraph (a) of §1015 and subsections (a)(2)-(5) later became §1425.

Since §1015(a), which prohibits making false statements in naturalization proceedings, and §1425(a), which prohibits procurement of naturalization "contrary to law," were both part of the same section of the 1940 Act and were clearly directed at different kinds of conduct, it is submitted the difference in conduct embraced by this statute was intended by Congress to continue after the penal provisions of the 1940 Act were separated. Indeed, if Congress intended §1425(a) to cover all situations in which naturalization was procured by the making of a false

statement, there would have been no need for §1015(a) to exist.

Section 1425(a), as indicated above, proscribes knowingly procuring naturalization "contrary to law." It is submitted an alien procures naturalization "contrary to law" only when he obtains naturalization without having complied with all of the statutory requirements to become a citizen. Thus, it may be that if an alien makes a statement in a naturalization proceeding which he knows is false and which is made for the purpose of circumventing the statutory requirements for naturalization, the alien may be prosecuted under §1425(a). If, however, the alien makes a false statement in a naturalization proceeding which is unrelated to the statutory requirements for naturalization, it is

submitted he may not be prosecuted under §1425(a) but, rather, must be prosecuted under §1015(a), or perhaps even under 18 U.S.C §1001. 4/

Counsel for Mizrahi has been unable to find any criminal case which interprets the term "contrary to law" as that term is used in §1425(a). Indeed, counsel has been unable to discover a reported case where a naturalized defendant has been convicted under §1425(a) for making a false statement in naturalization proceedings. There are, however, cases which deal with denaturalization proceedings which, it is submitted, provide support for Mizrahi's position that it is impermissible to prosecute a person under §1425(a) for making

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4/ Section 1001 is reproduced in Appendix B.

a false statement in a naturalization proceeding when the false statement does not directly relate to a statutory requirement for naturalization.

The denaturalization provisions of the 1940 Act were contained in §338(a). As can be seen from a review of §338(a), that section authorized a civil action for the revocation of a certificate of naturalization if the certificate was procured by fraud or if the certificate was "illegally procured." 8 U.S.C. §1451(a) contains the current grounds for revoking a certificate of naturalization. This section authorizes the revocation of a certificate if it was "illegally procured" or "procured by concealment of a material fact or by wilful misrepresentation." It is abundantly clear from a reading of the 1940

Act and present §1451(a) that Congress has for years intended to differentiate between a situation where naturalization was illegally procured vis a vis where naturalization was procured by fraud (the 1940 Act) or the concealment of a material fact or by wilful misrepresentation (§1451(a)). Stated another way, the history of the provisions of the law relating to denaturalization makes it crystal clear that the illegal procurement of naturalization was considered to be entirely different from procuring naturalization by making a false statement. This conclusion is also supported by the authorities discussed below.

In **United States v. Ginsberg**, 243 U.S. 472, 475, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1916), the court stated:

> "No alien has the slightest right to naturalization unless all

> statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in §15 [of the 1906 Act] and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; . . ."

See also **Maney v. United States**, 278 U.S. 17, 49 S.Ct. 15, 73 L.Ed. 156 (1928), and **United States v. Kahn**, 1 F.2d 1006, 1007 (D.C. Mass. 1924).

United States v. Kusche, 56 F.Supp. 201 (C.D. Cal. 1941), contains an in-depth discussion of the differences between procuring naturalization "illegally" and by fraud under the denaturalization sections of the 1906 Act (23 Stat. 603).

It is absolutely clear from the authorities discussed above that the term

"illegally procured" as used in the statutes relating to denaturalization means "contrary to law," i.e., embraces a situation where naturalization has been procured without satisfaction of the statutory requirements. The term "illegally procured" as used in the denaturalization statutes was not intended to include a situation where naturalization was obtained by making a false statement, unless the false statement related directly to the statutory requirements for naturalization. This conclusion is buttressed by the decision in **United States v. Kusche, supra**, at p. 228.

To repeat, based upon the authorities referred to above, it is submitted that the term "contrary to law," as used in the law relating to the naturalization

of aliens, has a definite meaning. Specifically, this term means that naturalization was procured without the alien satisfying all of the statutory requirements for naturalization. The term "contrary to law" has never been intended to embrace the situation where an alien made a false statement in a naturalization proceeding and later procured naturalization, unless the false statement went directly to a statutory requirement for naturalization.

Although the authorities cited above were cases involving the interpretation of the phrase "illegally procured" in the setting of denaturalization proceedings, it cannot be rationally argued that the term "contrary to law," as used in §1425(a), the section pursuant to which Mizrahi was indicted, has a

different meaning. It follows, therefore, that no person may be indicted under §1425(a) for procuring naturalization "contrary to law" when the act engaged in by the person was making a false statement in a naturalization proceeding which did not directly relate to the statutory requirements for naturalization. Only this interpretation has the effect of recognizing the difference between §1425(a) and §1015(a), i.e., the difference between procuring naturalization illegally (contrary to law) and making false statements in a naturalization proceeding.

In the present case, as indicated, Mizrahi was indicted under §1425(a) for having falsely stated that he had never sustained any convictions in or outside of the United States, except for some

traffic violations. Mizrahi was impermissibly prosecuted under §1425(a) if it was not a statutory requirement for naturalization that he had never previously sustained a criminal conviction.

Title 8 U.S.C. §1421 et seq. sets forth the statutory requirements relating to naturalization. Simply stated, it is nowhere provided in these sections that it is a requirement of naturalization that an alien not have any record of previous criminal convictions. Accordingly, since the alleged false statement made by Mizrahi in this case did not go directly to one of the statutory requirements of naturalization, it is submitted his naturalization was not procured "contrary to law," as that term is used in §1425(a), and his prosecution under that section was not proper.

As indicated above, Mizrahi respectfully submits that he was impermissibly prosecuted under §1425(a). Since Mizrahi's counsel at no time objected to or challenged the prosecution under §1425(a), it is respectfully submitted counsel failed to afford the effective assitance of counsel guaranteed by the Sixth Amendment. **McMann v. Richardson, supra.**

Further, it is clear counsel's error prejudiced Mizrahi. Thus, it must be noted that the indictment returned against Mizrahi alleged that he engaged in the conduct described in the indictment in 1974. The indictment in this case was returned against Mizrahi in May 1981. Since 18 U.S.C. §3291 provides for a ten-year statute of limitations for prosecutions under §1425(a), it is

clear the indictment returned against Mizrahi did not violate the statute of limitations. If, however, counsel for Mizrahi had made the appropriate objections and challenge to the prosecution under §1425(a), Mizrahi could not have been prosecuted under either 18 U.S.C. §1001 or §1005, since prosecutions under both of these sections are subject to the general five-year statute of limitations (18 U.S.C. §3282).

CONCLUSION

For any or all of the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HARVEY A. SCHNEIDER

Attorney for Petitioner